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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/721,829
Filing Date: November 24, 2003
Appellant(s): VENTURINO ET AL.

Alan R. Marshall
For Appellant

EXAMINER'S ANSWER

This is in response to the supplemental appeal brief filed April 13, 2009, appealing from the Office action mailed April 30, 2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

This appeal involves claims 1, 3-6, 12-16 and 21-33.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

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(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows: Claims 1, 3-6, 12-16, 21-23 and 26-33 are rejected under 35 U.S.C. 102 as being anticipated by Mesek.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

4,670,011

MESEK

06-1987

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 3-6, 12-16, 21-23 and 26-33 are rejected under 35 U.S.C. 102(b) as being anticipated by Mesek (U.S. Patent No. 4,670,011).

With respect to **claim 1**: Mesek teaches an absorbent article 10 comprising: an outer cover material 16; a liner 12; and an absorbent structure 14 positioned between the outer cover

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material 16 and the liner 12, the absorbent structure 14 including a front portion, a rear portion, and a middle portion, the front portion having a width, the absorbent structure 14 further comprising a pair of opposing lateral flaps 26 folded at least onto the middle portion defined by central portion 28 of the absorbent structure, each of the flaps 26, when in an unfolded state, extending beyond the width of the front portion. Examiner's position is based upon the fact that no clear boundaries for the front portion are recited in claim 1. Claim 1 only requires that the front portion have a width and define an outermost lateral periphery. The front portion of Mesek can be defined anywhere between the start of the narrower middle portion and the front end of batt 114. (Figs. 5,6) Any portion defined between the start of the middle portion and a point in the front area of batt 114 that is wider than the middle portion, defines an outermost lateral periphery in the form of a portion of each of the side edges created by cutting lines 30 and has a width defined between those portions is a front portion that anticipates the claimed front portion. The side flaps 26 extend beyond the periphery defined by any of those front portions, thus the prior art of Mesek anticipates claim 1. As can be seen from Fig. 4, each of the flaps 26 has a width adjacent to the middle portion that is necessarily from about 25% to 100% of the width of the middle portion, since each flap 26 when folded completely covers either a second flap 26 or the middle portion 28 and said flaps 26 have an outer edge that coterminates with the side edges of the middle portion 28. (Col. 7, lines 24-47)

With respect to **claim 3**: The middle portion is narrower than the front portion and the back portion. (Fig. 2)

With respect to **claim 4**: As can be seen from Fig. 4, each of the flaps 26 has a width adjacent to the middle portion that is necessarily from about 33% to 100% of the width of the middle

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portion, since the flaps have an outer edge that coterminates with the side edges of the middle portion 28 and each flap when folded either completely covers a second flap 26 or the middle portion 28. (Fig. 4) Thus each flap has a width that is about 100% of the width of the central portion 28, i.e. the said middle portion.

With respect to **claim 5**: Each of the flaps completely covers either a second flap or the middle portion 28 of the core as can be seen in Fig. 4, thus each flap has a width adjacent to the middle portion that is from about 50% to 100% of the width of the middle portion.

With respect to **claim 6**: As can be seen in Fig. 2, the absorbent structure 14 has an hourglass-like shape.

With respect to **claim 12**: The lateral flaps 26 are connected to the middle portion and wherein each of the flaps 26 is separated from the front portion by a first slit in the form of cutting line 30 and separated from the rear portion by a second slit in the form of a second cutting line 30.

With respect to **claim 13**: The absorbent structure 14 defines a longitudinal axis that extends from the front portion to the rear portion, the first slits 30 and the second slits 30 being substantially perpendicular to the longitudinal axis. (Fig. 2)

With respect to **claim 14**: The absorbent structure 14 defines a longitudinal axis that extends from the front portion to the rear portion, the first slits 30 and the second slits 30 extending generally in a diagonal direction in relation to the longitudinal axis.

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With respect to **claim 15**: The absorbent structure 14 necessarily has a generally uniform basis weight when in an unfolded state, as the flaps 26 are constructed from the same material as the remainder of core 14. (Col. 7, lines 25-38, Col. 8, lines 20-22)

With respect to **claim 16**: The absorbent structure 14 defines a longitudinal axis that extends from the front portion to the rear portion, the first slits 30 and the second slits 30 being curved and thus extending in a non-linear fashion in relation to the longitudinal axis. (Col. 7, line 41)

With respect to **claim 21**: The absorbent article 10 is a diaper. (Col. 7, line 5)

With respect to **claim 22**: The absorbent structure 114, a second embodiment of structure 14, comprises superabsorbent particles. (Col. 10, lines 26-33)

With respect to **claim 23**: The absorbent structure 14 comprises pulp fibers and superabsorbent particles. (Col. 8, lines 20-22, Col. 10, lines 26-33)

With respect to **claim 26**: Once each of the lateral flaps 26 have been folded, the middle portion necessarily includes areas that have a basis weight that is at least twice the basis weight of the front portion and the rear portion, since the front portion and rear portion of structure 14 are of uniform thickness and material with the remainder of structure 14, namely the central portion 28 and each flap 26.

With respect to **claim 27**: Once each of the lateral flaps 26 have been folded, the middle portion includes areas that have a basis weight that are at least twice that of the front and rear portions,

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i.e. at least 100% greater, which overlaps the range of an area having a basis at least 150% greater than the basis weight of the front portion and the rear portion once said flaps 26 have been folded.

With respect to **claim 28**: Once each of the lateral flaps have been folded, the middle portion includes areas that have a basis weight that is at least twice the basis weight of the front portion and the rear portion, i.e. 100% greater, which overlaps the range of an area having a basis weight at least three times the basis weight of the front portion and the rear portion once said flaps 26 have been folded.

With respect to **claim 29**: The front portion includes a center area and two opposing lateral areas and the rear portion also includes a center area and two opposing lateral areas, as can be seen in Fig. 2. Once each of the lateral flaps 26 have been folded, the middle portion 28, the center area of the front portion, and the center area of the rear portion necessarily each have a basis weight that is at least 150% greater than the basis weight of the two opposing lateral areas of the front portion and the two opposing lateral areas of the rear portion, since the basis weight of the two opposing lateral areas and the front portion is uniform with respect to the basis weight of the center area of the front portion and the middle portion prior to folding.

With respect to **claim 30**: The front portion includes a center area and two opposing lateral areas and the rear portion also includes a center area and two opposing lateral areas, and wherein, once each of the lateral flaps 26 have been folded, the middle portion 28, the center area of the front portion, and the center area of the rear portion each have a basis weight that is necessarily at least twice the basis weight of the two opposing lateral areas of the front portion

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and the two opposing lateral areas of the rear portion, since the outer edge of each flap 26 is coterminal with the edges of the medial portion 28, and the flaps 26 and medial portion 28 have a uniform basis weight prior to folding. (Figs. 2,4)

With respect to **claim 31**: Once each of the lateral flaps 26 have been folded, the middle portion has a basis weight that is necessarily at least three times the basis weight of the two opposing lateral areas of the front portion and the two opposing lateral areas of the rear portion, and the center area of the front portion and the center area of the rear portion have a basis weight that is at least twice the basis weight of the two opposing lateral areas of the front portion and the two opposing lateral areas of the rear portion, since the outer edge of each flap 26 is coterminal with the edges of the medial portion 28, and the flaps 26, medial portion 28 and the central area of said front portion of absorbent structure 24 have a uniform basis weight prior to folding. (Figs. 2,4)

With respect to **claim 32**: Once each of the lateral flaps 26 have been folded, the middle portion 28 comprises two layers of material. (Fig. 4)

With respect to **claim 33**: Once each of the lateral flaps 26 have been folded, the middle portion comprises three layers of material. (Fig. 4)

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject

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matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Appellant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 24 and 25 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Mesek ('011).

With respect to **claim 24**: The limitation "the absorbent structure comprises an air formed web" constitutes product-by process claim language. Mesek teaches that the absorbent structure 114 is formed from at least one fibrous web 131,133 that are airblown webs. (Col. 15, lines 18-22, Col. 17, lines 20-30) The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different

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process.” *In re Thorpe*, 777 F.2d 695, 227 USPQ 964 (Fed. Cir. 1985). See also MPEP § 2113. The burden shifts to appellant to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product. *In re Marosi*, 710 F.2d 798, 802, 218 USPQ 289, 292 (Fed. Cir. 1983) Alternatively, it would be obvious to one of ordinary skill in the art to modify the article of Mesek so as to have an absorbent structure that comprises an air-formed web with a reasonable expectation of success to provide an equally well-performing absorbent structure to that explicitly taught.

With respect to **claim 25**: The absorbent structure 14 of Mesek meets all of the limitations of claim 25. With regard to the limitation of “has a basis weight of from about 100 gsm to about 2,000 gsm”, when the structure or composition recited in the reference is substantially identical to that of the claims of the instant invention, claimed properties or functions presumed to be inherent (MPEP 2112-2112.01). A prima facie case of either anticipation or obviousness has been established when the reference discloses all the limitations of a claim except for a property or function (in the present case, a particular range of basis weights) and the examiner can not determine whether or not the reference inherently possesses properties that anticipate or render obvious the claimed invention but has a basis for shifting the burden of proof to appellant, as per *In re Fitzgerald*, 619 F.2d 67, 205 USPQ 594 (CCPA 1980).

(10) Response to Argument

With respect to arguments under heading I.A.: As to appellant's argument that the absorbent batt is rectangular prior to the slits 30 being made and thus the flaps could not extend beyond the outermost lateral periphery of the front portion, appellant is again reminded that the front portion is not clearly and explicitly recited or defined in the disclosure. The front portion can

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either encompass only the portion covering the torso or it can encompass the portion covering the torso and the portion that connects the portion covering the torso and the crotch region. From that, the outermost lateral periphery will either only include the vertical side edges of the torso portion or will include those side edges and the side edges of the portion connecting the torso portion with the crotch region, i.e. the side edges created by slits 30. In that case, and in that connecting portion region, the flaps certainly extend beyond the outermost lateral periphery of the front portion because the outermost periphery starts and ends wherever the bounds of that front portion lie. As those bounds are not claimed or explicitly disclosed, the flaps of Mesek anticipate the claim limitation regarding flaps that extend beyond the outward lateral periphery. As to the benefits of this structural feature, though they are not claimed they are still met by Mesek because Mesek anticipates the recited flaps. As to repeated comments from the appellant regarding an interview with other examiners regarding the Mesek reference, the current examiner is not bound by the decision of previous examiners. In fact, because appellant did not follow the previous examiner's suggestion to amend the claims to clearly define the front portion, contrary to appellant's assertion that such amendments were made and remain in claim 1, appellant's comments are moot, as overcoming the Mesek reference is necessarily contingent on such a claim amendment. Thus, as the amendment to recite a clear definition of the front portion was not made, the prior art of Mesek is still valid prior art and was applied as such by the current examiner against the claims.

With respect to arguments under headings I.B. and II: Appellant's arguments with regard to claims dependent on claim 1 have been fully considered but are not persuasive, as appellant's arguments depend entirely on arguments regarding the rejection of claim 1, which have been addressed *supra*.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Melanie J Hand/

Examiner, Art Unit 3761

Conferees:

/Tatyana Zalukaeva/

Supervisory Patent Examiner, Art Unit 3761

/Leslie R. Deak/

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